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In The

United States Supreme Court

OCTOBER TERM
1970

No. [redacted] 260

MARY GRANGER,
Petitioner,

vs.

WILBUR J. COHEN, SECRETARY OF HEALTH, EDUCATION AND WELFARE,
Respondent

PETITION FOR WRIT OF CERTIORARI ON BEHALF OF MARY GRANGER FROM A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

Appellant, Mary Granger, petitions the Supreme Court of the United States to issue a writ of certiorari in the above captioned case, and in support of this petition represents to this Court the following:

a. Reference to Official and Unofficial Reports

This cause was originally presented to Judge Jesse E. Eschbach of the United States District Court for the Northern Division of Indiana. Judge Eschbach, in an unpublished opinion, on the 10th of January, 1969, opined as follows:

(SEE EXHIBIT A)

This cause was then duly appealed to the United States Court of Appeals for the Seventh Circuit. On

April 15, 1970, the said Court of Appeals rendered the following opinion:

(SEE EXHIBIT B)

b. Jurisdiction of the Supreme Court

Jurisdiction of this Court is invoked pursuant to Supreme Court Rule 19.1(b), which reads as follows:

> "Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court, or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

The judgment sought to be reviewed is above set out and was handed down April 15, 1970. No petition for rehearing or extension of time within which to petition for certiorari is here involved.

c. Questions Presented for Review

The precise issues raised below and presented for review are:

1. Was appellant effectively denied her right to counsel as guaranteed by the Due Process Clause of the United States Constitution.
2. Was appellant deprived of her right to a fair hearing as required by the Due Process Clause of the United States Constitution.
3. Was appellant effectively misinformed as to the statutory scheme designed by Congress to

secure counsel for indigent Social Security claimants and thus deprived of the benefits of said scheme.

The statutory scheme referred to is 42 U.S.C.A. §406, which provides for employment of counsel on a contingency fee basis.

d. Constitutional and Statutory Provisions Directly Involved

The Constitutional provisions and statutes which are hereinvolved read as follows:

1. "No person shall . . . be deprived . . . of property, without due process of law." Article V of The Bill of Rights

2. **Representation of Claimants Before the Secretary**

a) "The Secretary may prescribe rules and regulations governing the recognition of agents or other persons, other than attorneys as hereinafter provided, representing claimants before the Secretary, and may require of such agents or other persons, before being recognized as representatives of claimants that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases. An attorney in good standing who is admitted to practice before the highest court of the State, Territory, District, or insular possession of his residence or before the Supreme Court of the United States or the inferior Federal courts, shall be entitled to represent claimants before the Secretary. The Secretary may, after due notice and opportunity for hearing, suspend or prohibt from further

practice before him any such person, agent, or attorney who refuses to comply with the Secretary's rules and regulations, or who violates any provision of this section for which a penalty is prescribed. The Secretary may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Secretary under this subchapter, and any agreement in violation of such rules and regulations shall be void.

Whenever the Secretary, in any claim before him for benefits under this subchapter, makes a determination favorable to the claimant, he shall, if the claimant was represented by an attorney in connection with such claim, fix (in accordance with the regulations prescribed pursuant to the preceding sentence) a reasonable fee to compensate such attorney for the services performed by him in connection with such claim. If as a result of such determination, such claimant is entitled to past-due benefits under this subchapter, the Secretary shall, notwithstanding section 405(i) of this title, certify for payment (out of such past-due benefits) to such attorney an amount equal to whichever of the following is the smaller: (A) 25 per centum of the total amount of such past-due benefits, (B) the amount of the attorney's fee so fixed, or (C) the amount agreed upon between the claimant and such attorney as the fee for such attorney's services. Any person who shall, with intent to defraud, in any manner willfully and knowingly deceive, mislead, or threaten any claimant or prospective claimant or beneficiary under this subchapter by word, circular, letter or advertisement, or who shall knowingly charge or collect directly or indirectly any

fee in excess of the maximum fee, or make any agreement directly or indirectly to charge or collect any fee in excess of the maximum fee, prescribed by the Secretary shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall for each offense be punished by a fine not exceeding $500 or by imprisonment not exceeding one year, or both."

b) (1) "Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 403(i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

(2) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) of this subsection is aplicable any amount in excess of that allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both." 42 U.S.C.A. §406.

Aug. 14, 1935, c. 531, Title II, §206, 49 Stat. 624; Aug. 10, 1939, c.666, Title II, §201, 53 Stat. 1362; 1946 Reorg. Plan No. 2, §4, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; Aug. 28,

1950, c.809, Title I, §109(b) (1), 64 Stat. 523; 1953 Reorg. Plan No. 1, §§5, 8, eff. Apr. 11, 1953, 18 F.R. 2053, 67 Stat. 631; Aug. 28, 1958, Pub. L. 85-840, Title III, §309, 72 Stat. 1034; July 30, 1965, Pub. L. 89-97, Title III, §332, 79 Stat. 403; Jan. 2, 1968, Pub. L. 90-248, Title I, §173, 81 Stat. 877.

e. Concise Statement of Case

A concise statement of the facts material to a consideration of the issues presented is as follows:

On the 5th of October, 1966, Mary Granger applied for disability benefits under the Social Security Act. Her application was denied. A hearing was had on September 21, 1969 to review the Department's refusal to grant her petition. The hearing examiner also denied her compensation.

Mary Granger's intellectual attributes as described by the Government's psychologist, M. C. Beyerl, Ph.D. as follows: (See Exhibit "C")

1. "gave inappropriate remarks due to an inability to comprehend"
2. "she could not read or write"
3. "she was very vague as to dates"
4. "there were strong indications of anxiety"
5. "very self-conscious regarding her inability to read and write"
6. "Wechsler Adult Intelligence Scale indicated she was in lower 1% of general population."
7. "estimated mental age, 9 years, 3 months"
8. "estimated intelligence quotient — 64"
9. "her present intellectual functioning would be described as being within the mental deficient range"
10. "the client's strengths and liabilities are within the range expected of persons functioning at the borderline mental deficient or

mentally deficient range. All of the subtests are within the lower 5% of the general population."

11. "can make simple change but would need supervision in more adult financial transactions"
12. "has gross feelings of personal inadequacy . . in search of and needs environmental support . . . she is suspicious, easily threatened and regresses to infantile type behavior."
13. "there are indications of low ego strength, and lack of self-will which further diminishes the client's lowered intellectual ability"
14. "client has hysterical type of personality with evidence she experiences panic attacks"
15. "gross feelings of inadequacy encourages panic attacks which is a form of passivity"
16. "the client . . . experiencing anxiety reaction which might be classified as anxiety hysteria"
17. "the psychological implications associated with the symptons are nervousness, headaches, panic attacks which are a form of passivity" (for the entire text see Exhibit "C")

Such then is the human being who has been denied Social Security benefits as a result of a hearing where she had been expected to adequately represent herself.

Under 42 U.S.C.A. §406, a claimant may employ an attorney on a contingency fee basis. This method of employment is apparently encouraged because Congress has, in effect, created a lien in favor of the attorneys fee.

At the hearing, the hearing officer asked Mary Granger if she was represented by counsel. She said she wasn't because she couldn't afford counsel. The

hearing member then proceeded with the hearing without advising her that she could employ an attorney on a contingency fee basis.

The hearing examiner was put on notice immediately that Mary Granger was not acquainted with the extent of her right to counsel.

(see Exhibit D)

Illiteracy in combination with feeble-mindedness has long been recognized to be a special circumstance. One who is an illiterate moron is incompetent to intelligently cope with legal matters. It has been judicially recognized that such persons are peculiarly in need of an attorney.

Robbins vs **State** (1968) 235 N.E. 2d 199, ... Ind. ....; **Payne** vs **State of Arkansas** (1958) 356 US 560, 78 S.Ct. 844, 2L.Ed 2nd 975; **Fikes** vs **State of Alabama** (1957) 352 U.S. 191, 77 S.Ct. 281, 1 L. Ed2nd 246.

While it may be arguable that a person of average or better intelligence, equipped with an adequate education, might be able to effectively represent himself in a disability hearing, it is clear that one such as Mary Granger cannot. To expect an illiterate moron to sufficiently comprehend the Social Security Act and effectively prepare her case to present to a hearing officer, is to anticipate that which will never occur.

It is, and has been, our position that Mary Granger should have been advised of her right to employ counsel on a contingency fee basis. In light of her mental and emotional limitations, it must be apparent that she could not prepare and present her own case. She should not have been left with the impression that she would need to employ counsel on a per diem basis.

f. State Court Involved Not Applicable.

g. Basis for Original Federal Jurisdiction

The basis for federal jurisdiction in the first instance is the fact that this case involves the United

States as a party defendant, and further involves a question of United States law.

h. Argument for Allowance of the Writ

This petition for writ of certiorari should be allowed because the 7th Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. To my knowledge, this case is unique in that it is the only reported decision addressing itself to the due process rights of indigent, illiterate, mental defectives in administrative proceedings under the Social Security Act. It addresses itself to the question, "Does a Social Security hearing officer have a duty under the due process clause to explain to a petitioner — especially one who is an illiterate, mental defective — her right to be represented by counsel on a contingency fee basis as provided for by Congress under 42 U.S.C.A. §406?" The 7th Circuit Court of Appeals answered that question in the negative. We believe the 7th Circuit Court of Appeals is wrong. We ask this Court to hold that such a duty does exist.

GOVERNMENTAL POLICY CONSIDERATIONS

It has long been the policy in this state to secure to all the benefits of a properly presented cause:

> Any poor person not having sufficient means to prosecute or defend an action may apply to the court in which the action is intended to be brought, or is pending, for leave to prosecute or defend, as a poor person. The court, if satisfied that such person has not sufficient means to prosecute or defend the action, shall admit the applicant to prosecute or defend as a poor person, and shall assign him an attorney to defend or prosecute the cause, and all other officers requisite for the prosecution or defense, who shall do their duty therein without taking any fee or reward therefor from such poor person. **Burns Ind. Stat. Ann.** §2-211.

The Congress of the United States has similar thoughts as to the desirability of the disadvantaged being represented.

Examples of Congressional concern are:

(a) 18 U.S.C.A. §3005 (Accused, treason or capital crime, defense by counsel)

(b) 5 U.S.C.A. §1005 (Administrative procedure act, right to representation by counsel)

(c) 10 U.S.C.A. §3785, 3795 (Army officers proceedings for separation from service)

(d) 10 U.S.C.A. §8785, 8795 (Air Force Officer, proceedings for separation from service)

(e) 50 App §520 (Appointment of attorney to represent person in military service)

(f) 12 U.S.C.A. §248(1) (Board of Governors of the Federal Reserve System, power to employ attorneys)

(g) 42 U.S.C.A. §1971 (Civil rights, contempt cases, assignment for defense)

(h) 8 U.S.C.A. §§1252, 1362 (Deportation Proceedings, representation of alien by attorney)

(i) 28 U.S.C.A. §1915 (In forma pauperis proceedings, requesting attorney to represent person unable to employ counsel)

(j) 42 U.S.C.A. §1714 (War Risk Hazards Compensation Act, legal services)

(k) 42 U.S.C.A. §406 (Social Security Act)

These examples are by no means an exhaustive list of the acts in which Congress has specifically provided for attorney representation.

The United States Supreme Court has repeatedly, over the past ten (10) years, expressed its concern that persons be represented in Court so that their rights might be protected. **Escabedo** v **Illinois** 378 U.S. 478, 84 S.Ct. 1758 and cases cited.

Other courts in the land have shown concern for the indigent. **Perry** v **Willard** (Or 1967) 427 P2d 1020; **U.S. Ex rel Russo** v **State of New Jersey** (1965) 351 F2d, 429, 437.

The cases cited involve the rights of criminals and juvenile offenders. To that extent they are inapplicable on their facts. However, they are applicable in that they stand for the proposition that one's legal rights are entitled to official consideration and need to be safeguarded by the State even at the expense of executive efficiency. The efficiency of the Department of Health, Education and Welfare would not be unduly sacrificed if hearing officers, in processing disability claims, were required to explain to applicants their right to be represented by counsel on a contingency fee basis.

No doubt more claimants would seek legal assistance. Perhaps there would then be fewer transcripts like the one before this Court today.

RIGHT TO COUNSEL

The Social Security Act at 42 U.S.C.A. §406 reads as follows:

> . . . An attorney in good standing who is admitted to practice before the highest court of the State, Territory, District, or insular possession of his residence or before the Supreme Court of the United States or the inferior Federal courts, shall be entitled to represent claimants before the Secretary. . . . If as a result of such determination, such claimant is entitled to past-due benefits under this subchapter, the Secretary shall, notwithstanding section 405(i) of this title, certify for payment (out of such past-due benefit) to such attorney an amount equal to whichever of the following is the smaller: (A) 25 per centum of the total amount of such past-due benefits, (B) the amount of the attorney's fee so fixed, or (C)

> the amount agreed upon between the claimant and such attorney as the fee for such attorney's services.

It seems fair to suggest that the Congress believed the presence and participation of counsel in social security disability hearings was a matter to be encouraged. The act contemplates that counsel should be paid directly by the government. Thus, Congress went so far as to statutorily provide for the protection of counsel's fees.

This view is shared by our Federal Courts:

> As a practical matter, **attorneys should be encouraged to assist** in the presentation of complicated claims. The attorney's absence in such cases is lamented in a number of opinions which comment on the chaotic records of such cases on appeal to the Federal Courts. (Our emphasis) **Randolph** v **United States** (1967) 274 F.Supp. 200, 203, 204.

The Courts have been insistent that "inexorable safeguards" involving fundamental principals of "fair play" be observed by administrative agencies in the exercise of their quasi-judicial powers. Our Supreme Court stated:

> "The first question goes to the very foundation of the action of administrative agencies instrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the Legislature. The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the Legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand a fair and

open hearing,' - - essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.' " **Morgan** v **United States,** 304 U.S. 1, 14, 58 S. Ct. 733, 775, 999 L.Ed. 1129.

A somewhat similar view was expressed in the Prettyman case:

"The maintenance of proper standards on the part of administrative agencies in the performance of their quasi judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

National Labor Relations Board v **Prettyman** (1941) 117F.2d 786, 791.

Just what constitutes due process in the administrative framework will vary with the situation.

In determining this question we must bear in mind that "Due process is not necessarily judicial due process". See Brandeis concurring in St. Joseph Stock Yards Co. v United States, supra, 209 U.S. 77, 56 S.Ct. 720. Due process is elusive, undefinable, and varies to embody the "differing rules of fair play, which through the years have become associated with differing types of proceedings." Hannan v Larche, 363 U.S. 420, 442, 80 S.Ct. 1502, 1515, 4 L.Ed2d 1307; and see Market Street R. Co. v Railroad Comm'n, 324 U.S. 548, 562, 65 S.Ct. 770, 89 L.Ed. 1171. Indeed, adminis-

trative determinations are usually made in furtherance of a legislative scheme to achieve what has been legislatively determined to be socially desirable, and they are often more legislative in nature than judicial, i.e., see Opp Cotton Mills v Administrator, 312 U.S. 126, 61 S. Ct. 524, 85 L.Ed. 624. And, so it is in our case. These farmer-commissioners do not sit as a judicial or even a quasi judicial tribunal where witnesses are sworn and evidence taken. They sit informally to appraise and assess relative rights of their neighbors and themselves in the administration of a program by and for farmers. Their judgment in the first instance is essentially based upon observations and considerations within their peculiar knowledge unaided and unimpeded by traditional notions of evidence. Rules of procedure and evidence are inapplicable and inappropriate. But, the "basic concepts of fair play" are "inexorable safeguards for due process. See Morgan v United States, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129. This means that what was said and done in these informal proceedings affecting Garvey's rights must have been in an open forum with notice and an opportunity for the traditional right of confrontation and cross-examination. Ibid., and Cf. Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed2d 1377. In this context we look to the administrative records to determine whether what was said and done in the informal hearings at any stage of the de novo proceedings conformed with the basic concepts of fair play, i.e., a full, albeit informal, discussion of the pertinent issues with the right of confrontation and cross-examination, i.e. see Opp Cotton Mills v Admr., supra. 312 U.S. 126, 61 S.Ct. 524. **Garvey v Freeman** (1968) 397 F2d 600, 612.

Where there are fact issues to be confronted and a judgment as to where the truth lies to be made, then

the proceedings must be judicatory in form as well as substance.

> On the other hand, in a hearing there are parties, and issues of law and of fact to be tried, and at the conclusion of the hearing, action is taken which may materially affect the rights of the parties. Hearings are usually open to the public. The parties are entitled to be present in person **and by counsel** and to record the proceedings or be provided with a record by the hearing body. The parties to a hearing are entitled to participate therein, to argue, and to brief their case, and, if findings of fact and an order are made, they are entitled to be furnished copies. Morgan v United States, 304 U.S. 1, 58 S.Ct. 999, 82 L.Ed. 1129. These essential differences between an investigation and a hearing are what permit the two proceedings to be conducted in different manners. **Bowles** v **Baer** (1944) 142 F.2d 787, 789 (Emphasis supplied.)

While the exact mechanical procedure required to meet the judicial mandate is no where judicially set out, the earmarks of an acceptable procedure have been expressed. These marks have been summarized by American Jurisprudence as follows:

> Specifically, due process, procedural due process, or due process in the exercise of adjudicatory, judicial, or quasi-judicial power, requires an orderly proceeding appropriate to the case or adapted to its nature, **just to the parties affected**, and adapted to the ends to be attained; one in which a person has an opportunity to be heard, and to defend, enforce, and protect his rights before a competent and impartial tribunal legally constituted to determine the right involved; **representation by counsel;** procedure at the hearing consistent with the essentials of a fair trial according to established rules which do not violate fundamental rights, and in conformity to statutes

> and rules conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed; revelation of the evidence on which a disputed order is based and oportunity to explore that evidence, and a conclusion based on the evidence and reason. Due process may also embrace the right to judicial review of a determination by an administrative agency in certain cases. 2 **Am. Jur. 2d Administrative Law** §353. (Emphasis supplied.)

In this particular case the petitioner, Mary Granger, was a functional illiterate and a mental defective. Mental defectives have been the beneficiaries of an expanded recognition of their need for representation at hearings and proceedings in which their rights are involved:

> . . . . Where, as in both proceedings for juveniles and **mentally deficient persons,** the state undertakes to act in parens patriae, it has the inescapable duty to vouchsafe due process, and this necessarily includes the duty to see that a subject of an involuntary commitment proceedings is afforded the opportunity to **the guiding hand of legal counsel** at every step of the proceedings, unless effectively waived by one authorized to act in his behalf. Certainly, this duty is not discharged when, as here, the prosecuting attorney undertakes to "prosecute the application (for commitment) on behalf of the state", and the proposed patient is not otherwise represented by counsel. In re Custody of a minor, 102 U.S.App. D.C. 94, 250 F2d 419; Kent v United States, 383 U.S. 541, 86 S.Ct. 1045; 16 L.Ed.2d 84; McDaniel v Shea, 108 U.S.App.D.C. 15, 278 F.2d 460; Dooling v Overholser, 100 U.S.Supp. D.C. 247, 243 F2d 825; Shioutakon v District of Columbia, 98 U.S. App. D.C. 371, 236 F.2d 666; Anno. 87 A.L.R.2d 950. Nor is it sufficient that the Wyoming statute

permissively provides that the proposed patient "may be represented by counsel". Fourteenth Amendment due process requires that the infirmed person, or one acting in his behalf, be fully advised of his rights and accorded each of them unless knowlingly and understandingly waived. **Heryford v Parker** (1968) 396 F.2d393, 396.

Here the hearing examiner was put on notice immediately that Mary Granger was not acquainted with the extent of her right to counsel.

OPENING STATEMENT BY HEARING EXAMINER:

This hearing in the matter of Mary L. Granger, Social Security No. 308-12-3263, a claimant for the receipt of disability insurance benefits, is now open. The hearing is being conducted on the 21st day of September, 1967 opening at 10:40 a.m., in the Grant County Court House, Marion, Indiana with the claimant present.

Mrs. Granger, in the notice of hearing that I mailed to you, dated August 3, 1967, you were advised that you could be represented by an attorney or other qualified person, if you wished, although this is not necessary. Since you have come to the hearing without a representative, shall I assume that you do not have a representative and therefore wish to represent yourself?

CLAIMANT: What you mean?

HEARING EXAMINER: You have no lawyer?

CLAIMANT: Oh no, I never have the money. It takes money and I have so many (Vol. II, t.p. 24) bills now I can't afford anything like that. I got to pay — I can't pay my doctor bill now.

HEARING EXAMINER: Before we begin to take testimony in your case, I would like to

make a brief statement to you regarding the procedure that is followed in this type of hearing. The purpose of such a hearing is to make certain that a claimant who has received an unfavorable administrative determination has an opportunity to present his case before a person who has had no previous contact with the case. I am a Hearing Examiner in the employ of the Bureau of Hearings and Appeals of the Social Security Administration. I shall make a new and independent decision based upon the record that we will make today. That record will consist of certain of the documents already in your file which were used in processing your application up to this point, as well as such other documents that you have to submit and which are received in evidence. The record will also include your testimony and the testimony of any witnesses that you may care to call. This hearing will be informal and the technical rules of evidence prevailing in civil court proceedings will not be followed. My main interest is in obtaining all of the facts in connection with your case. I desire to ascertain your educational background, work history, factors affecting your health, and anything else that will shed further light in this matter. The testimony will be taken under oath and a verbatim record made by the reporter. After I have finished asking my questions, you will have an opportunity to tell me anything else that you think is important in your case. When all of the testimony is in, you will have an opportunity to suggest to me what you think my findings of fact should be and to present whatever reasons you think exist as to why there should be a decision in your favor. (Vol. II, t.p. 25)

My first knowledge of your case came only after you had filed your request for hearing. At that time, your complete file which contains the

various documents which have been gathered up to the present time was sent to me. I have gone through that file, and I have marked as proposed exhibits 1 through 18, those papers which I thought were material and relevant and which properly reflect what has happened in your case to date. A list has been made of these documents, and you have also had an opportunity to examine the documents themselves before the hearing. You have the right to object to each or all of them becoming exhibits, and you have the right to examine any of these papers. It is satisfactory with you to admit these documents into the record? These are the reports here from the doctor.

CLAIMANT: Well I got — it's okay.

HEARING EXAMINER: There being no objection, proposed exhibits 1 through 18 are admitted into evidence as Exhibits 1 through 18, respectively. Have you brought any additional papers or documents with you to the hearing that you wish included in the record?

CLAIMANT: I just got the papers from the factory and things like that.

HEARING EXAMINER: Mrs. Granger, after I read these documents which we have just taken into the record as exhibits, I prepared a brief summary of your case. I would like to read it to you at this time for the purpose of refreshing your memory and to be sure that you understand what facts are in issue and what facts it is necessary for you to establish in support of your application for benefits.

The record shows that you filed an application for disability benefits on October 5, 1966, alleging inability to engage in any type of substantial (Vol. II, t.p. 26) gainful work. After reconsideration of your claim was denied because it

was not established that your impairments were of sufficient severity as to have continuously prevented you from engaging in some type of substantial gainful activity from November 25, 1956, the alleged date of onset of disability. Being dissatisifed with this determination you filed a request for hearing on June 19, 1967. You allege that you became unable to engage in any type of substantial gainful work because of blood clots, swollen legs, and nervousness.

The issues for decision are whether you are entitled to disability insurance benefits under Section 223(a) of the Social Security Act, as amended, and whether a period of disability may be established under Section 216(i) of such Act. The issues are dependent upon specific findings as to whether, during the effective period of the application filed October 5, 1966, and while the special earnings requirement was met, you were under a disability in that you were unable to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which (under the law in effect prior to the 1965 Amendments) can be expected to result in death or to be of long-continued and indefinite duration and, if so, the beginning date of such disability. You met the special earnings requirement through June 30, 1962. Thus, on the basis of your application filed October 5, 1966, the evidence must establish that you were under a disability as defined in the Act beginning on or before June 30, 1962, for entitlement to disability insurance benefits, and on or before June 30, 1962, for establishment of a period of disability.

Consideration will also be given as to whether you are entitled to disability insurance benefits under the 1965 Amendments to the Social Security Act. These amendments extend the prospective life of an application for benefits (Vol. II, t.p.

27) until the issuance of a final administrative decision or until a final court decision, and delete the requirements that the individual's impairment must be one which can be expected to be of long-continued and indefinite duration and substitute the requirement that the impairment has lasted, or can be expected to last, a continuous period of twelve months or to result in death. For purposes of disability insurance benefits, the new definition is effective with respect to benefits payable for September 1965.

At this point I'd like to have you stand, raise your right hand, and be sworn.

The claimant, MARY I. GRANGER, having first been duly sworn, testified as follows:

EXAMINATION BY HEARING EXAMINER:

(Note: **The claimant is very difficult to understand** (our emphasis.) (Vol. II, t.p. 28.)

Q. Your date of birth is what, ma'am?

A. January 15, 1914.

Q. At one point there, you filed a card showing your date of birth as January 15, 1920?

A. You right, you right, January 15th.

Q. What day is it, January or July?

A. January 15, I'm all balled up (Vol. II, t.p. 28)

Q. How tall are you, ma'am?

A. "Bout five foot three.

Q. What is your present weight?

A. Well, 'bout 190.

Q. What's the most you ever weighed?

A. Oh I weighed 200 once, over 200, since I've been sick, I've been going down. (Vol. II, t.p. 29)

Q. What kind of work does he do there, ma'am?

A. I couldn't tell you 'cause I been sick and I never did take interest enough to ask him.

Q. What is your address at the present time?

A. 1731 I think, I haven't lived here too long, I get balled up, I never go anywhere to find out anything. (Vol. II, t.p. 30)

Q. Allright now, tell us about your education. How many years of schooling have you had?

A. Why I ain't had very many. My dad and mother was poor people, they couldn't send me. I went let me see to about the 4th grade.

Q. When you were a child going to school, did you live in the town of Elwood, or did you live on a farm? (Vol. II, t.p. 30)

A. No, in Elwood.

Q. What kind of work did your father do?

A. He worked at the Tin Plate.

Q. To the best of your recollection, did you finish the 4th grade?

A. Yeah.

Q. How old were you about when you got out of school, would you say?

A. Round 16. I never did pass. My mom and dad never did get my books and I never did learn. (Vol II, t.p. 31)

A. Well, doctored with a doctor out by the park, I don't remember what his name was. He was a new doctor and I doctored out there for a long time (Vol. II, t.p. 39)

Q. Was that before June 30, 1962?

A. Yeah.

Q. Where was this at, in Anderson?

A. Elwood. He was out by the park. He was a chiropractor and a doctor too. He was out by the park in Elwood. I can't think of his name to save my neck. He's got a funny name, I can't say it. (Vol. II, t.p. 40)

A. Well, I doctored with blood clots with another doctor at Elwood. I still owe him, I don't know what his name is, out by the park. I owe him a big doctor bill.

Q. Is that the doctor that's a chiropractor?

A. Yeah, and I owe him a big doctor bill and I quit going on account of I couldn't afford to pay it. (Vol. II, t.p. 44)

Q. Allright now, when you go home, I want you to try to remember, if you can, the name of the chiropractor that treated you. I want to get as much evidence as I can about your physical condition as it was before June 30, 1962. And in particular what your condition was when you had to retire or quit work at the Guide Lamp Division. The record that we have now is not very complete, but it's the best that we can get.

A. Well, I don't see how come he sent one in there, 'cause it's his fault that I went out of the factory. I tried to work and I was sick and he got aggravated at me, 'cause I was sick and throwed me out. (Vol. II, t.p. 48)

Q. What doctor examined you for the insurance company so that you could get your sick benefits, do you remember? Was it the company doctor?

A. Yeah.

Q. Do you remember his name?

A. No. (Vol. II, t.p. 49)

Q. Well it's not necessary that you be examined but it may be possible if the record so indicates. As it is now, there is very little evidence in the record to show exactly what you had before June 30, 1962, and practically nothing to show why you quit work in 1956. (Vol. II, t.p. 49)

Q. Let the record show that the claimant waives the right to see the report of examination.

Do you do any reading around the house, any magazines?

A. I can't read, I'll plain out with you, I won't lie to you anything you ask me I won't lie.

Q. You can't read?

A. No.

Q. I don't want you to lie, can you read?

A. I know how to write my name and I know how to count and some of my ABC's, I won't lie to you.

Q. Can you get a-hold of a newspaper and read the newspaper?

A. No. I went to school and my teacher passed me 'cause I never had my books, they wouldn't help me with my books. They just passed me on 'cause I didn't have books. Never learned how to read.

Q. In other words, you cannot read?

A. Yes, you're right. I won't lie to you. Won't lie to anything 'cause I belong to the church. (Vol. II, t.p. 50)

DUTY TO ADVISE EFFECTIVELY AS TO RIGHT TO COUNSEL

It should be noted that the Hearing Examiner, after a pro forma inquiry as to whether Mrs. Granger was represented, then proceeded to advise her as to the law. His discertation on the law is very lengthy. Nowhere does he explain to her that she is entitled to employ counsel on a contingency fee basis. Nowhere is she advised that under the standard arrangement, contemplated by statute, her attorney would only be entitled to compensation in the event she won.

This was critical information because Mrs. Granger was under the mistaken belief that she could only employ counsel on a retainer and per diem basis.

OPENING STATEMENT BY HEARING EXAMINER:

This hearing in the matter of Mary L. Granger, Social Security No. 308-12-3263, a claimant for the receipt of disability insurance benefits, is now open. The hearing is being conducted on the 21st day of September, 1967 opening at 10:40 a.m., in the Grant County Court House, Marion, Indiana with the claimant present.

Mrs. Granger, in the notice of hearing that I mailed to you, dated August 3, 1967, you were advised that you could be represented by an attorney or other qualified person, if you wished, although this is not necessary. Since you have come to the hearing without a representative, shall I assume that you do not have a representative and therefore wish to represent yourself?

CLAIMANT: What you mean?

HEARING EXAMINER: You have no lawyer?

CLAIMANT: Oh no, I never have the money. It takes money and I have so many (Vol. II, t.p. 24) bills now I can't afford anything like that. I got to pay — I can't pay my doctor bills now.

HEARING EXAMINER: Before we begin to take testimony in your case, I would like to make a brief statement to you regarding the procedure that is followed in this type of hearing. The purpose of such a hearing is to make certain that a claimant who has received an unfavorable administrative determination has an opportunity to present his case before a person who has had no previous contact with the case . . . etc. (Vol. II, t.p. 25)

It is the law that one who assumes a duty with respect to another must exercise due care in its fulfillment. **Prosser Torts** 2nd Ed. H.B. pg. 185-187. One

may terminate his responsibility by turning the object of his assistance over to one competent to render expert assistance — i.e. turning an injured person over to a doctor. **Ohio & Miss R. Co.** v **Early** (1894) 141 Ind 73, 40 N.E. 257, 28 L.R.A. 546; **The Terre Haute & Indianapolis Railroad Co.** v **McMurray** (1884) 98 Ind 358. Here the hearing officer assumed the responsibility of advising Mrs. Granger of her legal rights. Having assumed this responsibility he was duty bound to advise her in an effective way that she could be represented by an attorney at no direct cost to herself. The mere fact that the advice was given without expectation of payment does not diminish the quality or gravity of the obligation.

> In order to hold the attorney for negligence in the conduct of litigation it is not necessary to show that he was retained on the promise of compensation, since the duty to exercise the requisite care and skill is imposed when he undertakes the case, regardless of whether he is to receive compensation.
>
> United States—**Spangler** v **Sellers** (1881, CC Ohio) 5 F 882
>
> Indiana—**Moorman** v **Wood** (1889) 117 Ind 144, 19 NE 739 (dictum that obligation of reasonable care and diligence will be enforced even where no compensation is received).
>
> Kentucky—**Eccles** v **Stephenson** (1814) 6 Ky (3 Bibb) 517.
>
> Virginia—**Stephens** v **White** (1796) 2 Va (2 Wash) 203. 45 ALR2d, p.15 and 16 (attorneys — negligence—liability)

Mrs. Granger surely needed counsel if ever one did. She is a person incapable of even the least demanding of tasks. To permit her to attempt to represent herself in a matter as factually involved and legally complex as this, without fully informing her of her

right to counsel at no direct expense to herself, clearly falls below the level of reasonable care imposed when the hearing officer took it upon himself to give her legal advice.

DUE PROCESS CONTEMPLATES PRESENCE OF COUNSEL

The counsel requirements of "due process" are summarized as follows:

> One who might be affected thereby has the right to be present at the hearing in person and represented by counsel. The right to a hearing includes the right to aid of counsel, although such aid need not be given at early stages of the proceeding. A state or federal court which arbitrarily refuses to hear a party by counsel employed by and appearing for him in any case, civil or criminal, denies the party a hearing, and therefore denies him due process of law in the constitutional sense. 16 **Am.Jur.2d** Constitutional Law §573, p. 978

In short, the absence of counsel at a hearing may so taint the proceedings as to amount to the effective denial of a hearing. Here we have an illiterate moron, completely unfamiliar with such things as the nature of her husband's work, the streets in her neighborhood, and the name of the physicians who cared for her, being asked to present a complex legal matter involving substantial legal rights and many thousands of dollars in disability benefits to a quasi-judicial officer. Her incompentence to perform the task is crystalline. The knowledge of the hearing officer regarding her condition, or at least having reason to suspect her general incompetence, seems beyond question—otherwise why have her examined by Dr. M. C. Beyerl, M.D.

If justice was achieved in this proceeding, it was accidental. Certainly there was no calculated effort to assure a full exposure of all the facts. The only

person who actually testified was Mary Granger — a certified illiterate moron! The other evidence was in the form of letters, forms, and such. Very little was actually revealed about the circumstances leading to her removal from the active job market. People who could presumably shed light on the situation were not called as witnesses, i.e., her husband, children, brothers, and sisters, and parents.

Surely such a slap-dab "hearing" as this ought not receive the imprimatur of this Court. This woman needed help. It works no great hardship upon the Secretary to insist that hearing officers explain to obvious incompetents the opportunity to secure counsel under the statutory scheme. The hearing officer permitted Mrs. Granger to fumble away her social security rights under the misapprehension that she could only employ an attorney on a per diem and retainer basis.

CONCLUSION

The record on appeal clearly demonstrates that Mary Granger did not understand her right to be represented by counsel at the hearing held September 21, 1967. The record clearly reveals the Secretary knew, actually or constructively, that Mary Granger was an emotionally crippled, illiterate moron totally incompetent to represent herself at the hearing. The record clearly reveals the Secretary made no effort to make sure that Mary Granger knew she had a right to be represented by counsel and had a real and genuine opportunity to put this right into practical effect.

The net result was a totally inadequate hearing in which very little of the facts were actually brought out. None of the people who knew Mary Granger and could help her were called to testify. The net result was a pro forma hearing in which justice could scarcely be expected to emerge.

i. Opinions of Trial and Appellate Court

The opinion of the Trial Court and the Appellate Court are attached and marked "Exhibit A & B".

j. Review of State Court

Not applicable.

Respectfully submitted,

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EXHIBIT "A"

(Caption) (Vol I, Tr. p. 31-47)

ORDER

This is a civil action for review of a final decision of the Secretary of Health, Education, and Welfare (hereinafter "the Secretary"), denying plaintiff's application for a period of disability and for disability insurance benefits under sections 216 and 223 of the Social Security Act, 42 U.S.C. §§416, 423. This action is authorized under 42 U.S.C. §405 (g). It is now before the Court on cross motions for summary judgment filed by the Secretary on July 9, 1968, and by the plaintiff on October 25, 1968. The plaintiff's motion for summary judgment must be denied. The defendant's motion for summary judgment must be granted, and accordingly judgment must be entered for the defendant.

The plaintiff, Mrs. Mary Granger, filed her application for a period of disability and for disability insurance benefits under Sections 216 and 223 of the Social Security Act, 42 U.S.C. §§416, 423, with the Social Security Administration on October 5, 1966. The application was denied on April 18, 1967. Plaintiff filed a request for reconsideration on May 1, 1967, and on June 8, 1967, the Social Security Administration again found that she was not under a disability, which finding followed a prior determination by the Indiana State agency that plaintiff was not under a disability. 42 U.S.A. §421. On June 19, 1967, plaintiff filed her request for a hearing, which was held before a Hearing Examiner on September 21, 1967, at Marion, Indiana. The plaintiff was present and testified. The record discloses Mrs. Granger was informed of her right to have counsel present, but she appeared without counsel. The hearing examiner, on October 30, 1967, held that the plaintiff was not entitled to a period of disability or to disability insurance benefits. The plaintiff requested on November 8, 1967, a review of the hearing examiner's action by the Appeals

Council. The appeals council denied the plaintiff's request on November 29, 1967, and thus the hearing examiner's decision became the final decision of the Secretary of Health, Education, and Welfare.

Plaintiff then filed this action on March 1, 1968. The Secretary filed with his answer a certified copy of the transcript of the record of Mrs. Granger's case, as provided in 42 U.S.C. §405 (g). In deciding these motions for summary judgment, the Court has considered the record of Mrs. Granger's application in the Social Security Administration and the pleadings and briefs of the parties filed in this action for review of the Secretary's determination.

The plaintiff raises three objections to the decision of the Secretary denying her application. She contends, first, that she was denied a truly fair and impartial hearing because she lacked representation by counsel; two, that the record, taken as a whole, supports her claim and shows the Secretary's decision to have been improper; and, three, that the record is devoid of job availability evidence.

I

The Court first considers the plaintiff's contention regarding the alleged denial of a truly fair and impartial hearing due to the absence of legal counsel for plaintiff. She contends that representation was both desirable and necessary under the circumstances because of the mental deficiences of the plaintiff, which she alleges were both known to the hearing examiner and were a part of the record. However, plaintiff has failed to show, except by mere conclusory allegations, that her lack of representation resulted in the denial of a fair and impartial hearing. For 42 U.S.C. §406, upon which plaintiff relies, simply **permits** claimants the right of legal representation, but does not require such representation. **cf. Ussi v Folsom,** 254 F.2d 842 (2d cir. 1958). It may indeed have been desirable, as plaintiff alleges, for counsel to

have aided her, but it is not shown that it was necessary in order that she receive a fair and impartial hearing.

The record in this action reveals that plaintiff was duly notified of her right to have an attorney represent her at the hearing by way of the written Notice of Hearing and, orally, by the hearing examiner at the commencement of the hearing. Furthermore, the written notice and, more particularly, the hearing examiner himself carefully delineated in detail the procedure to be followed during the hearing, the issues to be decided, the definition of "disability", and what would be expected of the plaintiff during the proceedings. After careful consideration of the entire record in this action and, in particular, the transcript of testimony at the hearing, the Court concludes that it would be sheer, unfounded speculation to insist that legal representation was necessary to insure that plaintiff obtain a fair and impartial hearing. The record does not suggest, nor does the plaintiff establish in any manner, that plaintiff failed to obtain a fair and impartial hearing.

Furthermore, counsel cites only two authorities for the proposition that plaintiff should have had representation in light of her known mental deficiences. **Escobedo v State of Illinois,** 378 U.S. 478, 84 S.Ct. 1758 (1964) is wholly inopposite for numerous reasons, chief of which is the fact that it involved not an administrative agency hearing, as here, but the much different and historically more rigorous criminal interrogation proceeding. Indeed, the Supreme Court, in that landmark opinion, unequivocally held that the requirement of counsel applies only "when the process shifts from investigation to accusatory — when its focus is on the **accused** and its purpose is to elicit a confession . . ." 378 U.S. at 492. (Emphasis added.) It is obvious that here not only was plaintiff not an accused in any criminal proceeding, but also that the investigation involved was not accusatory in

nature. Counsel's reliance on **Paul v. Celebrezze,** 337 F.2d 352 (9th cir. 1964) is equally misplaced, for the case does not remotely involve nor does the court's opinion even discuss the right to counsel in Social Security proceedings. Therefore, the court concludes that plaintiff was not denied a fair and impartial hearing by reason of the absence of counsel under the circumstances disclosed in the record before this court.

II

The court next considers the plaintiff's second contention that the record, taken as a whole, supports her claim and shows the Secretary's decision to have been improper. The role of this court in reviewing determinations made by the Secretary of Health, Education, and Welfare under the Social Security Act is limited by 42 U.S.C. §405. That section provides in part that

> ". . . the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive . . ."

Thus, the Secretary's determination must be affirmed if the record as a whole contains substantial evidence to support them. This court may neither resolve conflicts in the evidence nor make independent determinations as to the credibility of witnesses. **Moon v. Celebrezze,** 340 F.2d 926 (7th Cir. 1965). The United States Court of Appeals for the Seventh Circuit held in the **Moon** case that

> "when the record as a whole will support equivocal but reasonable determinations, neither the district court nor this court may make a redetermination to comport with our own views of the case. If we were to do so, we would be assuming the role of a superagency rather than providing a check against unreasonable and arbitrary results." 340 F.2d at 930.

The final decision of the Secretary was rendered November 29, 1967, which was prior to the effective date (January 1968) of the most recent amendments to Sections 216 and 223 of the Social Security Act. Pub. L. No. 90-238, §158 (January 2, 1968), 1 U.S. Code Cong. and Adm. News, 90th Cong., 1st Sess. (1967), pp. 982-984. However, these amendments are applicable to applications for disability benefits and disability determinations if a civil action for review brought under 42 U.S.C. §405 (g) is pending. Pub. L. No. 90-248, supra, §158 (e). The new standards are therefore applicable to this case. The recent amendments to Sections 216 and 223 of the Social Security Act, 42 U.S.C. §§ 416 and 423, added further limitations to the definition of "disability." If the Secretary's denial of disability status and disability benefits to Mrs. Granger was supported by substantial evidence under the old standards, then **a fortiori** the Secretary's decision must be upheld under the new standards.

The definition of "disability" applicable to Mrs. Granger at the time of the Secretary's determination for purposes of disability determination under 42 U.S.C. §416 and eligibility for disability benefits under 42 U.S.C. §423 was

> "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months . . ."

The plaintiff, now approximately fifty-four years of age, has no more than a fourth-grade education and is the mother of two children. Her husband works at the General Tire Company in Marion, Indiana. She has worked as a peeler in a tomato cannery and as a headlight inspector at Guide Lamp Division of General Motors. Her duties at Guide Lamp included

inspecting chromium rims in which headlights are inserted and inspecting electric wiring in automobiles. She last worked as an inspector in 1956 and thereafter did some seasonal work in a cannery. Mrs. Granger alleges that she has been unable to work since November 1956, and that her physician had told her to stop working because she had blood clots, severe hypertension, and swollen legs.

The hearing examiner found, and the plaintiff does not dispute, that the plaintiff was last insured for disability purposes under the Social Security Act on June 30, 1962. 42 U.S.C. §§416, 423. The hearing examiner also found that Mrs. Granger is not physically, mentally, or vocationally precluded from the performance of her usual work, which would include her former duties in a canning factory, and that the evidence does not establish that her present unemployment is the result of a physical or mental impairment. The hearing examiner further found that Mrs. Granger was not under a disability on or prior to June 30, 1962.

It is the plaintiff's contention that the above findings by the hearing examiner are not supported by any substantial evidence because there exists in the record only the isolated remarks of one of the medical witnesses who admitted to little knowledge of the plaintiff. The court concludes, however, the the record as a whole fully supports the conclusion that the extensive medical evidence failed to confirm any physical or mental impairment precluding substantial gainful employment.

The record discloses that the hearing examiner, contrary to plaintiff's contentions, considered medical evidence offered by **three separate** medical doctors who had examined the plaintiff in recent years and evidence from one psychologist who examined the plaintiff at the request of the Indiana Vocational Rehabilitation Division. In addition, evidence was con-

sidered relating to the plaintiff's sick leave record while employed at Guide Lamp Division. As plaintiff rightly contends, Dr. W. A. Laudeman, a general practitioner, stated by letter that he had not seen the plaintiff more than five times in the past twenty years and therefore had not treated her consistently enough to give an evaluation of her condition at any time. He did note, however, that Mrs. Granger had been obese for many years "but has apparently not been sufficiently motivated to lose weight."

Dr. R. A. Rauh, a general practitioner and internist, performed a complete medical examination on the plaintiff on September 28, 1967 at the request of the Indiana State Disability Determination Agency. His final diagnosis was in essential agreement with the other medical evidence and concluded that Mrs. Granger suffered from obesity, severe anxiety neurosis, and mental retardation. He found that her chest was clear and heart, breast, lungs and blood pressure normal. Mrs. Granger made no mention to Dr. Rauh of shortness of breath or orthopnea although she did complain of chest pain and leg pains and headaches. Dr. Rauh's report did not contain any conclusions as to Mrs. Granger's ability to perform particular functions.

The record also contains a report submitted on October 10, 1967 to the Indiana state agency by Dr. M. C. Beyerl, a psychologist. Dr. Beyerl reported that Mrs. Granger's functioning ability would be classified as being in the mental defective range and that tests indicated she was illiterate. The report further concluded that Mrs. Granger, due to her mixed neurosis, anxiety, and hysteria, would be unable to obtain and maintain prolonged gainful employment in an open competitive job market. The report, however, spoke only of Mrs. Granger's condition as it existed at the time of the examination (October 1967) and was silent regarding her condition on and prior to June 1962.

The record also includes a report from Guide Lamp Division concerning Mrs. Granger's sick leave record during the 12 years from 1944 to 1956 that she was an employee. The report indicates that Mrs. Granger was granted sick leave on three occasions for nervous exhaustion or fatigue and on several other occasions for such routine problems as pregnancy, tonsillitis and influenza. The report draws no conclusions regarding Mrs. Granger's ability to perform satisfactory job functions and, furthermore, is silent regarding her work status or sick leave subsequent to July 1956.

Finally, the record in this cause includes a letter submitted on November 25, 1966, by Dr. Alvin Leroy, Mrs. Granger's personal physician. Dr. Leroy stated that he had seen Mrs. Granger several times since March of 1958, and that she suffered from severe anxiety, obesity and moderate essential hypertension. He further indicated that "recently she had been afflicted with petechial hemorraghes (sic) all over her body," but blood tests were unable to reveal the etiology. Additionally, he stated that she informed him that she had been asked a few years ago to take a leave of absence from work due to her severe neurosis. Dr. Leroy's letter concluded that "at this date on account of her severe anxiety and mental state, bleeding problem and obesity, I consider her totally disabled and unable to perform or hold any job in a factory.' His report drew no conclusions regarding her ability to perform satisfactorily job functions as of June 1962, and in response to further inquiries from the Social Security Administration Dr. Leroy stated that his letter of November 25, 1966 covered all the information he had.

On the basis of the above medical evidence, the hearing examiner concluded on October 30, 1967 that the preponderance of credible evidence indicates that "the evidence fails to establish that the claimant's impairments have prevented her from engaging in

substantial gainful activity beginning on or prior to June 30, 1962, which has lasted, or can be expected to last for a continuous period of at least 12 months." This was a reasonable finding on the basis of the medical record.

The burden was on the plaintiff to prove that she had a medically determinable physical or mental disability as defined by 42 U.S.C. §423, Supra, existing on and prior to June 30, 1962, the last day that she met the earning requirement for coverage, and which continued through October 5, 1966, the date she filed her application. 42 U.S.C. §216(i); **Degner v. Celebrezze**, 317 F.2d 819 (7th Cir. 1963); **Henry** v **Gardner**, 381 F.2d 191 (6th Cir. 1967). Plaintiff, in her motion for summary judgment and in her supporting memorandum, contends that the record as a whole shows the decision of the Secretary to be improper. However, it is not at all clear if the plaintiff is challenging the Secretary's findings regarding just one of the alleged ailments of obesity, neurosis, and mental deficiency or if plaintiff is arguing more broadly that all of the alleged ailments meet the statutory requirements for disability benefits. Notwithstanding this ambiguity, the court concludes that there is substantial evidence in the record to support the hearing examiner's findings that none of the alleged ailments, taken separately or together, confirm any impairments which preclude substantial gainful activity.

The record discloses that the plaintiff has long suffered from obesity, but, as Dr. Laudeman stated in his letter, Mrs. Granger has apparently not been sufficiently motivated to lose weight. The hearing examiner observed that Social Security regulations provide that an individual will be deemed not under a disability if, with reasonable effort and safety to himself the impairment can be diminished to the extent that the individual will not be prevented by the impairment from engaging in any substantial gainful activity. 20 C.F.R. §404.1502(g). The hearing exam-

iner concluded that since the evidence did not indicate that Mrs. Granger's obesity was from an organic cause, her condition was remediable and therefore not a disability within the law. This conclusion is fully supported by the record and the existing case law. See,e.q., **Brown v Celebrezze,** 367 F.2d 455 (4th Cir. 1966); **Bradley v Ribicoff,** 298 F.2d 855 (4th Cir.), cert. denied, 370 U.S. 951 (1962). It should be further noted that the record indicates Mrs. Granger suffered from obesity for much of the time she was actively employed by Guide Lamp Division, and her remediable obese condition then was apparently no hinderance in her ability to maintain gainful activity.

As for the plaintiff's anxiety neurosis condition, the hearing examiner observed that the Social Security regulations provide that the mere presence of psychoneurotic symptoms and signs is not necessarily incompatible with the ability to perform substantial gainful work. 20 C.F.R. §404.1519(c). The hearing examiner further noted that the regulations provide that in determining the effect of psychoneurosis, consideration is given to whether the psychoneurosis has resulted in confinement in a mental hospital. **Id.** The hearing examiner concluded that there was no evidence that the claimant's neuropsychiatric disorder presently requires hospitalization or that it has, in fact, ever required hospitalization, and therefore Mrs. Granger's psychoneurosis was not a disability within the law. The record fully supports the hearing examiner's conclusion.

The only direct evidence bearing on Mrs. Granger's nervous disorder was the written report submitted by a psychologist, Dr. Beyerl, for the Indiana state agency. His report made clear that the evaluation he rendered could only be related to Mrs. Granger's then-present condition in 1967 and was silent as to her condition on and prior to June of 1962. And, while the report concluded that Mrs. Granger "would be unable to obtain gainful employment in an **open**

competitive job market" (emphasis added), it was not determined if she would also be unable to return to or maintain her previous employment at Guide Lamp Division or at the cannery. This failure to consider her abilities in relation to her prior employment, coupled with the report's singularly prospective nature, fully justifies the hearing examiner's conclusion that the report merited little weight in determining Mrs. Granger's psychoneurotic condition on and prior to June 30, 1962.

On the other hand, the hearing examiner was justified in concluding, on the basis of the Guide Lamp sick leave record and the report by Dr. Rauh, that Mrs. Granger's neurosis had existed for many years, yet still permitted her to function adequately even at the intellectual and physical level reported by the various medical and psychological experts. There was no evidence disclosed in the record which indicated regression or deterioration of Mrs. Granger's intellectual behavior or emotional reactions beyond that which apparently occurred before or during her years of active employment. **Cf.** 20 C.F.R. § 404.1519(c) (2).

Concerning the plaintiff's mental retardation, the hearing examiner was fully justified in concluding that the plaintiff's mental condition had existed for many years, yet had not prevented her from functioning adequately while employed at Guide Lamp. The record discloses that Mrs. Granger received only a fourth grade education and is, by her own testimony, unable to read or write. Dr. Beyerl's report, based on the application of such standard testing methods as the Wechsler Adult Intelligence Scale and the Rorschach Projective Personality test, concluded that Mrs. Granger was within the range of persons functioning at the borderline of the mentally defective, with an estimated mental age of nine or ten years. Dr. Rauh's final diagnosis indicated that Mrs. Granger was suffering from mental retardation, and

the transcript of Mrs. Granger's testimony before the hearing examiner largely confirms this diagnosis. The hearing examiner was nonetheless fully justified in concluding that her mental impairment had not prevented her from engaging in substantial gainful activity on or prior to June 30, 1962, and, therefore, such mental condition is not a disability within the law. It has long been established that illiteracy and limited training in themselves do not constitute a physical or mental impairment justifying a finding of disability within the Social Security Act. 42 U.S.C. §416(i) (1); **Miller v Celebrezze,** 252 F. Supp. 598 (E.D.N.C. 1966); **Paul v. Ribicoff,** 206 F. Supp. 606 (D.C. Colo. 1962).

In view of the fact that the court concludes that the Secretary's denial of disability status and disability benefits to Mrs. Granger was supported by substantial evidence under the older standards and definitions of "disability", it is unnecessary to consider the Secretary's decision under the more recent and more restrictive standards. See supra.

III

The Court lastly considers the plaintiff's third contention that the record is devoid of job-availability evidence. The Court would first observe that the Secretary found that the medical evidence failed to confirm any impairment, either physical or mental, which precludes substantial gainful activity. It follows therefore, that the plaintiff is not precluded from returning to her former occupation as an inspector or as a cannery peeler. Therefore, it is unnecessary to consider at length the plaintiff's contention that where the evidence shows that a claimant cannot return to her former occupation, the burden shifts to the Secretary to demonstrate that there are other jobs in the economy which the claimant is capable of fulfilling. It is nevertheless appropriate to note that the question of whether or not the Secretary has the bur-

den of proving availability of employment opportunities to defeat a disability benefit claim has long been the subject of dispute among the various circuit courts of appeal. **Compare Jones v Celebrezze,** 331 F2d 226 (7th Cir. 1964); **Celebrezze v Sutton,** 338 F.2d 417 (8th Cir. 1964) **with Gardner v Brian,** 369 F.2d 443 (10th Cir. 1966); **Kerner v Flemming,** 283 F.2d 916 (2d Cir. 1960); **Ray v Celebrezze,** 340 F.2d 556 (4th Cir. 1965); Celebrezze v. O'Brient, 323 F.2d 989 (5th Cir. 1963); **Massey v. Celebrezze,** 345 F.2d 146 (6th Cir. 1965). Our own United States Court of Appeals for the Seventh Circuit, in **Jones v. Celebrezze,** supra, firmly established that the Secretary does **not** have such burden of proof. **And see Gee v. Celebrezze,** 355 F2d 849 (7th Cir. 1966). The Court is not only bound to follow the holding of our own Circuit Court of Appeals, but would observe that the legislative history of the most recent amendments to the definition of disability gives ample support to the position taken in this circuit. **See** S. Rep. No. 744, 90th Cong., 1st Sess. (1967), 2 U.S. Code Cong. and Adm. News, 90th Cong., 1st Sess., p. 2881. **See also Johnson v Cohen,** Civil Cause No. 1924 (N.D. Ind. Fort Wayne Division, June 28, 1968).

There is substantial evidence considering the record as a whole, to support the Secretary's findings that the plaintiff, Mrs. Mary Granger, was not under a disability as defined by Congress from a time on or prior to June 30, 1962.

Plaintiff's motion for summary judgment is therefore denied. The defendant's motion for summary judgment is granted, and judgment is hereby entered for the defendant in accordance with Rule 56(c) of the Federal Rules of Civil Procedure.

Entered this 10th day of January, 1969.

/s/Jesse E. Eschbach
United States District Judge

EXHIBIT "B"

In The

United States Court of Appeals

For The Seventh Circuit

September Term, 1969 January Session, 1970

No. 17478
MARY GRANGER,
Plaintiff-Appellant,
v.
ROBERT H. FINCH, SECRETARY OF HEALTH, EDUCATION AND WELFARE,
Defendant-Appellee,

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

April 15, 1970

Before KNOCH, Senior Circuit Judge and CUMMINGS and KERNER, Circuit Judges.

KNOCH, Senior Circuit Judge. This appeal is taken from grant of a motion for summary judgment in favor of defendant-appellee, the Secretary of Health, Education and Welfare. The Secretary sought summary judgment on the ground that the pleadings and transcript of hearings held on the application of plaintiff-appellant, Mary Granger, for disability benefits under the Social Security Act showed that the Secretary was entitled to judgment as a matter of law.

Plaintiff sets out the issue for review as follows: "The only issue presented for review is whether or not:

1. Appellant was effectively denied her right to counsel as guaranteed by the Due Process Clause of the United States Constitution.

2. was deprived of her right to a fair hearing as required by the Due Process Clause of the United States Constitution, and

3. was effectively misinformed as to the statute's scheme designed by Congress to secure counsel for indigent Social Security claimants and thus deprived of the benefits of said scheme."

Plaintiff is described in her brief as illiterate, mentally retarded and unemployable for several years because of alleged permanent physical impairment. Her application of October 5, 1966, for disability benefits under Title 42 U.S.C. §§416(i) and 423, was denied under date of June 8, 1967. After a hearing on her appeal September 21, 1967, the hearing examiner sustained the denial after evaluation of the evidence of several physicians and disability examiners, on the ground that plaintiff was not disabled within the meaning of the Act at any time prior to the expiration of her insured status on June 30, 1962.

Plaintiff then engaged legal counsel who sought review in the District Court, under Title 42 U.S.C. §405(g), asserting primarily that plaintiff was not adequately advised of her right to have counsel at the hearing held on September 21, 1967.

Plaintiff's counsel argues that the Secretary has a duty to inform applicants not only of their right to representation by counsel at the evidentiary hearing but also to advise them (as plaintiff was not advised by the hearing officer) that there is a possibility of securing legal representation on a contingency fee basis, subject, of course to the restrictions on fees outlined in the Act.

Because of Plaintiff's retardation, illiteracy and emotional instability, counsel asserts that extra and substantial care was required to ensure that plaintiff understood her rights and realized that she had a

real (as well as a theoretical) opportunity to put those rights into effect.

The District Court entered an Order which included extensive analysis of the record, the arguments of counsel and the applicable law. He found the decision of the Secretary was clearly supported by substantial evidence, of which he obviously made a detailed study. We agree.

As the District Judge noted, Title 42 U.S.C. §406 permits but does not require legal representation at evidentiary hearings.

Our own reading of the transcript satisfies us that the hearing examiner did make every effort to explain the nature and purpose of the proceedings to plaintiff, whose answers indicate that she did understand the examiner's statements and questions.

After the hearing the hearing examiner reopend the record to receive further reports from a physician and a psychologist. Actually there had been little showing of serious mental deficiency until after the hearing. Plaintiff mentioned her limited education and employed colloquial, ungrammatical expressions but she made clear and responsive statements. She also presented considerable documentary evidence to support her claim, although her counsel now sees those efforts as very feeble and inept.

The psychologist's report, on which plaintiff's counsel largely relies, was based on tests in October 1967, more than five years after the critical date when disability must have existed to entitle plaintiff to disability benefits. The description of the plaintiff in that report is sharply at variance with the picture that emerges from a reading of the testimony. Further, although the report suggests that these conditions have existed for many years, the hearing examiner noted that plaintiff was nevertheless able to function and was employed. Her vocational history

showed that from about 1930 to 1942 she had seasonal employment with Ace Canning Factory, and did baby-sitting and odd jobs during the off-season part of the year. From about 1942 until November 1956, she had worked as an "inspector" for General Motors Guide Lamp Division, after which she again worked at canning during many of the seasons from 1957 to 1965.

When asked at the outset whether she had a lawyer, plaintiff said that took money and she had so many bills she could not afford anything like that. The impression was that she was unwilling to pay any fee. There are no provisions for supplying counsel at government expense.

The District Judge found it would be sheer unfounded speculation to insist that legal representation was necessary to ensure a fair and impartial hearing for plaintiff. Her counsel now conjectures that an attorney might have presented as witnesses plaintiff's relatives, friends, or physicians who examined her at various pertinent times whose names she had since forgotten. We agree with the District Court that this is mere speculation. We cannot accept the plaintiff's view of the scope of the Secretary's duty to advise claimants. The judgment of the District Court is affirmed.

Affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

EXHIBIT "C"

REPORT OF PSYCHOMETRIC AND PSYCHOLOGICAL EVALUATIONS

October 10, 1967

Name of Client: Mary L. Granger AN 308-12-3264
Address of Client: 3117 South Branson Street, Marion, Indiana
Telephone of client: None listed.
Address of guardian: same as above
Date of testing: October, 1967
Date of birth: January, 1914
Chronological age: 53 years

Reason for referral: The O.A.S.I. Determination Section of the Indiana Vocation Rehabilitation Division has requested a special psychometric and psychological evaluation for the above named client. The standards for the psychometric evaluation demand that the Wechsler Adult Intelligence Scale or the revised Stanford Binet Intelligence Scale be administered. The psychological evaluation requests that projective tests be used. The authorization requests an opinion on the applicant's ability to manage funds.

Background Information

Mrs. Mary Granger was brought to the interview by a neighbor.

Mrs. Mary Granger is a 5 ft. 2 in., 182 lb., 53 year old white female. She is right handed and wore no glasses. The client was friendly and rapport was difficult to establish. The client was very fearful of the evaluation and "had to be calmed down" before the evaluation could be accomplished. She was upset and crying. Considerable time was spent attempting to obtain rapport acceptable for the evaluation. Rapport was somewhat difficult to maintain after a prolonged peri-

od of time. She began to give inappropriate remarks due to an inability to comprehend the reason for "personal questions". Thus, rapport was difficult to obtain but did improve during the interview and tended to deteriorate in the later portion of the interview.

When questioned as to her physical health, the client indicated she was under the doctor's care for "blood clots" and "nerves". The client readily displayed the "clots" on her arm. When questioned as to physical limitations, she said she could indulge in no hard work. She had to "take it easy". She indicated that "if she moves around her blood pumps too fast'.'

In discussing her life history, the client stated she was born in Elwood, Indiana. Her parents had a fourth grade education. Her 73 year old father used to be employed in an industrial plant where "he worked on templates" He is now drawing a Veterans' Pension. Her 72-year old mother is a housewife and has worked previously in a canning factory. The client has 4 brothers and 6 sisters. Their ages range from 40 to 50 years. Three of the 10 are deceased. The client was very vague regarding her siblings. She indicated that all are living in Indiana and are either factory workers or housewives. (Vol. II, t.p. 86)

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The client stated that she started public school at the regular age but was "passed on". She withdrew after the fourth grade. The client indicated that she "could not read or write".

The client was married to Charles Granger a "long time ago". They are the parents of 2 daughters — a 7-year old who is in school and

a 4-year old at home. Her husband is employed as a factory worker at the General Tire Company. She indicated "I got a good husband and a family". The client indicated that they rent a home and own a "junk car".

The client was requested to describe her work history. She stated that she left school at the age of 16 and worked in a canning factory. She was very vague as to dates. She indicated that she then did "housework" for other people. She took care of children for $3.00 a week". During the war and after the war, she worked as a factory worker at the Guide Lamp plant in Anderson, Indiana. She worked on-an-off for about 13 years. The client then indicated that her "nerves went bad". She had a hysterectomy and they took her out of the factory. This was the last job that she could "recall".

The client then spent considerable time rediscussing her physical ailments. She indicated that in addition to "nerves" she had "blood clots". "They are all over my chest." "I go to the doctor at Wabash for my legs and arms." "The doctor says if it hits my heart it will kill me." "Dr. LeRoy in Alexandria won't leave me to work." She indicated that when she gets ill, her mother-in-law or her sister-in-law comes to take care of her. They do the housework. "No one mistreats me". "My husband calls me honey—treats me like a baby, cooks, does the housework and worries about me."

Observation of the client during the interview and psychometrics:

The client was friendly and tried very hard to cooperate. It was apparent that she was doing the best of her ability at the time of the evaluation. There was strong indications of anxiety which reduced her attention span. She experien-

ced pronounced difficulty in taking directions for assigned tasks. It was evident of high tension by the fact that she "cried a lot". The client was very self-conscious regarding her inability to read and write. When the Minnesota Multiphasic Personality Inventory was attempted by reading the questions to her, it was evident that she did not have the depth of understanding or personality organization necessary for obtaining a valid meaure on this instrument. Toward the end of the evaluation, she began to get tired and a "little hostile". She gave strong indications that she was going to resist additional evaluations — "I'm a sick woman".

Psychometric Data

Previous Information:

None available at the time of the evaluation.

Present Information:

1. Wechsler Adult Intelligence Scale
   Administered: September, 1967
   Norms: General Population (45-54 years)
   Test Results: (next page)

(Vol. II, t.p. 87)

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(Wechsler Adult Intelligence Scale cond't)

Test Results:

	SCALED SCORE	IQ	PERCENTILE
Verbal Scale	24	66	02
Performance Scale	16	67	02
Full Scale	40	65	01

*Strong evidence of anxiety within achievement pattern.

2. Peabody Picture Vocabulary Test
   Administered: September, 1967
   Norms: General Population by Age (adult)
   Test Results:
   Raw Score: 73
   Chronological age: 53 years
   Estimated mental age: 9 years 3 months
   Estimated intelligence quotient: 64
   Percentile: 01

3. Wide Range Achievement Battery
   Administered: September, 1967
   Norms: General Population by Appropriate Grade Level
   Test Results:

	Grade Equivalent
Oral Reading Achievement	0.8
Arithmetic Achievement	2.2

4. Draw-a-Person Test

5. Minnesota Multiphasic Personality Inventory (invalid)

6. Rorschach Projective Personality Test

Test Results and Interpretations

As previously stated, the client was under medication for "nerves" but the type of medication was unknown. Rapport with the client met acceptable standards; however, the client was tense and anxious during the examination.

The Wechsler Adult Intelligence Scale was administered under the recommended standardized conditions. The full scale intelligence quotient of 65 is comprised of a verbal intelligence quotient of 66 and a performance intelligence quotient of 67. The client possesses as much meas-

ured intellectual ability as approximately 1 out of every 100 persons within the general population. Her present intellectual functioning would be described as being within the mental deficient range according to Wechsler's classifications.

The scaled scores on the subtests ranged from a scaled score of 0 to a scaled score of 5. This client's functional deficiencies are not easily detected since she earned scaled scores of 5 on the vocabulary, comprehension and similarities subtests, as well as the object assembly subtest. These elevated scales would indicate that the client's word knowledge, general information obtained from experience, practical manipulative ability, and ability to reason at the verbal level are assets. However, even her assets are within the borderline mental deficient range. The client's
(Vol. II, t.p. 88)

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liabilities are indicated by a scaled score of 0 on the digit symbol subtest, with a scaled score of 2 on the digit span and picture arrangement subtests, as well as a scaled score of 3 on the information subtest. These lowered scales indicate the presence of debilitating anxiety, as well as an inability to comprehend and understand social situations and a deficiency in the knowledge obtained within a classroom or scholastic environment. In summary, both the clients strengths and liabilities are within the range expected of persons functioning at the borderline mental deficient or mentally deficient range. All of the subtests are within the lower 5% of the general population.

The Peabody Picture Vocabulary Test, which is a measure of verbal ability, requires no performance type tasks. The findings of this verbal scale substantially supports the findings of the

verbal scale on the Wechsler. This 53-year old, white female would be described as functioning at a level expected of a 9 to 10 year old of normal intellect. The obtained intelligence quotient of 64 describes the client's functioning level (verbal ability) as being within the mental deficient range. She possesses as much measured verbal ability as 1 out of every 100 persons within her norm group. Thus, communications with this client will be difficult due to her limited word knowledge and inability to comprehend. In spite of debilitating anxiety, there are strong indications that this client's functioning level is in at least the lower 5% of the general population.

The Wide Range Achievement Battery describes the client as being functionally illiterate. She does recognize some letters in the alphabet but is unable to read. The client can do some simple addition and subtraction problems. Her arithmetic skills are as strong as an average 2nd and 3rd grade student. The client can make simple change but would need supervision in more adult financial transactions required of a person managing a home.

The personality scales describe this client as a person who is restless, feels inadequate, and has gross feelings of personal inadequacy. She is in search of and needs environmental support. When threatened, the client displays hysterical type behavior. She is suspicious, easily threatened and regresses to infantile type behavior.

The Rorschach Projective Personality Test was administered under the recommended standardized conditions. The client offered 20 responses which is sufficient to describe the client's personality organization. The expected response pattern for 20 responses would be 3W; 15D; and 2 Dd. This client offered 5W; 12D; and 3 Dd.

There are indications that the client is anxious and striving to understand the totality of her environment but is limited by reduced functioning level. Thus, more than the usual amount of small details within her environment will threaten and upset her.

The Z score (organizational score) for a person of average intellect ranges between 30.0 and 60.0. This client produced a Z score of 08.5 which indicates that the client's intellectual functioning at the time of the evaluation is in the mental deficient range. There is evidence of struggling for light into the environment; however, anxiety is reducing her functioning level below the borderline mental range.

The number of popular responses (P) for a person of average intellect usually ranges between 7 and 9. The P responses, as well as the animal responses (A%), within a protocol gives descriptions of the client's modal or adaptive thinking. This client offered 4P responses. Thus, the client experiences difficulty in even the more

(Vol. II, t.p. 89)

sterotype responses within the cards. A generalization would be that the client's grip on reality would be at best borderline with a constant struggle to perceive as others perceive the most general aspects within her environment. The A% indicates how well the client's precepts adhere to the most obvious or palpable forms within the protocol. The expected tolerance ranges between the 30th and 60th percentile. This client produced an A% at the 50th percentile. Thus, the client's responses are within limits of acceptability. She is stereotyped in her thinking and gives indica-

tions of difficulty in displaying adaptive behavior.

The associational content is very limited. She gave 1 human response, 10 animal responses, 1 anatomy, 1 landscape, 6 botany, and 1 travel response. This client is primarily concerned about meeting the demands of every day life, as well as her own health.

The F plus percent (F+%) on a protocol indicates the client's ability to direct her thinking from intellectual centers with acceptable discrimination. The minimal level of acceptability is the 60th percentile with the mean at about the 75th percentile. This client produced an F+% at the 40th percentile. Thus, this client is experiencing difficulty in directing her attention through intellectual power. There are indications of low ego strength, and lack of self-will which further diminishes the client's lowered intellectual ability.

An experience balance may be obtained on a protocol by weighing the movement responses with the number of color responses. This client gave no movement responses which indicates an inability to indulge in fantasy or wish activity. Such wish activity does tend to absorb emotionality or affect which is described by the number of color responses. This client gave 1 pure color response, 2 Cf responses. There are strong indications that this client has a hysterical type of personality with evidence she experiences panic attacks. The client is an immature and impulsive personality. She is inclined toward emotional outbursts which strongly suggests personal adjustment problems.

The client offered 3 Fy responses and 2 Fy responses. This indicates the client has strong feelings of physical inadequacy, inferiority and general dependency. These gross feelings of in-

adequacy encourage panic attacks which is a form of passivity. The vista response gives strong evidence that the anxiety level is of sufficient magnitude to render the client incapable of coping with the demands within her environment. The quality of the responses describe the client as having limited intellectual ability and subject to panic attacks which may be reflected in loss of appetite, numbness, irritability, and other general types of behavior patterns.

In summary, the personality instruments describe this client as experiencing anxiety reaction which might be classified as anxiety-hysteria. There are indications that the client may be physiologically incapable, however, such should be ascertained through physical examinations. The psychological implications associated with the symptoms are nervousness, headaches, panic attacks which are a form of passivity. Such client's persist in clinging and demand both vocational and financial help. They are passive-dependent in their marriages and predisposed to react to stress with a physical breakdown. Such clients adapt very poorly to environmental changes and experience difficulty in utilizing their intellectual potential effectively.
(Vol. II, t.p. 90.)

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In summary, the information in this evaluation describes a 53-year old, white female. She reports physical symptomotology which tends to handicap her in her vocational adjustment.

The measure of intellectual functioning describe the client's intellectual level as being within the lower 1% of the population. Her estimated mental age is 9 to 10 years. The client's function-

ing ability would be classified as being in the mental defective range.

The Wide Range Achievement Battery describes the client as illiterate. She is able to recognize some letters in the alphabet. Her arithmetic skills are as strong as a 2nd or 3rd grade student. The client can make simple change, but would need supervision in larger financial transactions.

The personality instruments describe the client as experiencing mixed neurosis, anxiety and hysteria. The client's personal adjustment diminishes further her limited intellectual potential. It would be this examiner's judgment, at the time of this evaluation, that the client would be unable to obtain and maintain prolonged gainful employment in open competitive job market. The client has gross feelings of inferiority, recognizes her intelleetual limitations, which tends to generate debilitating anxiety. This client is prone to severe anxiety and panic attacks which tend to continually render her vocationally ineffective. The client is a passive-dependent person who needs and seeks environmental support from such sympathetic persons as her husband.

Respectfully submitted,
/s/ M. C. Beyerl

M. C. Beyerl, Ph.D.
Psychologist
3801 Beechwood Avenue
Muncie, Indiana 47304

(Vol. II, Tp. 91)

EXHIBIT "D"

Opening Statement by Hearing Examiner:

"This hearing in the matter of Mary L. Granger, Social Security No. 308-12-3263, a claimant for the

receipt of disability insurance benefits, is now open. The hearing is being conducted on the 21st day of September, 1967, opening at 10:40 a.m., in the Grant County Court House, Marion, Indiana with the claimant present.

Mrs. Granger, in the notice of hearing that I mailed to you, dated August 3, 1967, you were advised that you could be represented by an attorney or other qualified person, if you wished, although this is not necessary. Since you have come to the hearing without a representative, shall I assume that you do not have a representative and therefore wish to represent yourself?

CLAIMANT: What you mean?

HEARING EXAMINER: You have no lawyer?

CLAIMANT: Oh no, I never have the money. It takes money and I have so many (Vol. II, t.p. 24) bills now I can't afford anything like that. I got to pay — I can't pay my doctor bills now.

HEARING EXAMINER: Before we begin to take testimony in your case, I would like to make a brief statement to you regarding the procedure that is followed in this type of hearing. The purpose of such a hearing is to make certain that a claimant who has received an unfavorable administrative determination has an opportunity to present his case before a person who has had no previous contact with the case. I am a Hearing Examiner in the employ of the Bureau of Hearings and Appeals of the Social Security Administration. I shall make a new and independent decision based upon the record that we will make today. That record will consist of certain of the documents already in your file which were used in processing your application up to this point, as well as such other documents that you have to submit and which are received in evidence. The record will also include your testimony and the testimony of any

witnesses that you may care to call. This hearing will be informal and the technical rules of evidence prevailing in civil court proceedings will not be followed. My main interest is in obtaining all of the facts in connection with your case. I desire to ascertain your educational background, work history, factors affecting your health, and anything else that will shed further light in this matter. The testimony will be taken under oath and a verbatim record made by the reporter. After I have finished asking my questions, you will have an opportunity to tell me anything else that you think is important in your case. When all of the testimony is in, you will have an opportunity to suggest to me what you think my findings of fact should be and to present whatever reasons you think exist as to why there should be a decision in your favor. (Vol. II, t.p. 25)

My first knowledge of your case came only after you had filed your request for hearing. At that time, your complete file which contains the various documents which have been gathered up to the present time was sent to me. I have gone through that file, and I have marked as proposed exhibits 1 through 18, those papers which I thought were material and relevant and which properly reflect what has happened in your case to date. A list has been made of these documents, and you have also had an opportunity to examine the documents themselves before the hearing. You have the right to object to each or all of them becoming exhibits, and you have the right to examine any of these papers. Is it satisfactory with you to admit these documents into the record? These are the reports here from the doctor.

CLAIMANT: Well I got — it's okay.

HEARING EXAMINER: There being no objection, proposed exhibits 1 through 18 are admitted into evidence as Exhibits 1 through 18, respectively. Have you brought any additional papers or documents with

you to the hearing that you wish included in the record?

CLAIMANT: I just got the papers from the factory and things like that.

HEARING EXAMINER: Mrs. Granger, after I read these documents which we have just taken into the record as exhibits, I prepared a brief summary of your case. I would like to read it to you at this time for the purpose of refreshing your memory and to be sure that you understand what facts are in issue and what facts it is necessary for you to establish in support of your application for benefits.

The record shows that you filed an application for disability benefits on October 5, 1966, alleging inability to engage in any type of substantial (Vol. II, t.p. 26) gainful work. After reconsideration of your claim was denied because it was not established that your impairments were of sufficient severity as to have continuously prevented you from engaging in some type of substantial gainful activity from November 25, 1956, the alleged date of onset of disability. Being dissatisfied with this determination you filed a request for hearing on June 19, 1967. You allege that you became unable to engage in any type of substantial gainful work because of blood clots, swollen legs, and nervousness.

The issues for decision are whether you are entitled to disability insurance benefits under Section 223(a) of the Social Security Act, as amended, and whether a period of disability may be established under Section 216(i) of such Act. The issues are dependent upon specific findings as to whether, during the effective period of the application filed October 5, 1966, and while the special earnings requirement was met, you were under a disability in that you were unable to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which (under the law in effect

prior to the 1965 Amendments) can be expected to result in death or to be of long-continued and indefinite duration and, if so, the beginning date of such disability. You met the special earnings requirement through June 30, 1962. Thus, on the basis of your application filed October 5, 1966, the evidence must establish that you were under a disability as defined in the Act beginning on or before June 30, 1962, for entitlement to disability insurance benefits, and on or before June 30, 1962, for establishment of a period of disability.

Consideration will also be given as to whether you are entitled to disability insurance benefits under the 1965 Amendments to the Social Security Act. These amendments extend the prospective life of an applicant for benefits (Vol. II, t.p. 27) until the issuance of a final administrative decision or until a final court decision, and delete the requirements that the individual's impairment must be one which can be of long-continued and indefinite duration and substitute the requirement that the impairment has lasted, or can be expected to last, a continuous period of twelve months or to result in death. For purposes of disability insurance benefits, the new definition is effective with respect to benefits payable for September, 1965.

At this point I'd like to have you stand, raise your right hand, and be sworn.

The claimant, MARY I. GRANGER, having first been duly sworn, testified as follows:

EXAMINATION BY HEARING EXAMINER:

(Note: **The claimant is very difficult to understand**) (our emphasis.) (Vol. II, t.p. 28.)

Q. Your date of birth is what, ma'am?

A. January 15, 1914.

Q. At one point there, you filed a card showing your date of birth as January 15, 1920?

A. You right, you right, January 15th.

Q. What day is it, January or July?

A. January 15, I'm all balled up. (Vol. II, t.p. 28)

Q. How tall are you, ma'am?

A. 'Bout five foot three.

Q. What is your present weight?

A. Well, 'bout 190.

Q. What's the most you ever weighed?

A. Oh, I weighed 200 once, over 200, since I've been sick, I've been going down. (Vol. II, t.p. 29)

Q. What kind of work does he do there, ma'am?

A. I couldn't tell you 'cause I been sick and I never did take interest enough to ask him.

Q. What is your address at the present time?

A. 1731 I think, I haven't lived here too long, I get balled up, I never go anywhere to find out anything. (Vol. II, t.p. 30)

Q. Allright now, tell us about your education. How many years of schooling have you had?

A. Why I ain't had very many. My dad and mother was poor people, they couldn't send me I sent let me see to about the 4th grade.

Q. When you were a child going to school, did you live in the town of Elwood, or did you live on a farm? (Vol. II, t.p. 30)

A. No. in Elwood.

Q. What kind of work did your father do?

A. He worked at the Tin Plate.

Q. To the best of your recollection, did you finish the 4th grade?

A. Yeah.

Q. How old were you when you got out of school, would you say?

A. Round 16. I never did pass. My mom and dad never did get my books and I never did learn. (Vol. II, t.p. 31)

A. Well, doctored with a doctor out by the park, I don't remember what his name was. He was a new doctor and I doctored out there for a long time. (Vol. II, t.p. 39)

Q. Was that before June 30, 1962?

A. Yeah.

Q. Where was this at, in Anderson?

A. Elwood. He was out by the park. He was a chiropractor and a doctor too. He was out by the park in Elwood. I can't think of his name to save my neck. He's got a funny name, I can't say it. (Vol. II, t.p. 40)

A. Well, I doctored with blood clots with another doctor at Elwood. I still owe him, I don't know what his name is, out by the park. I owe him a big doctor bill.

Q. Is that the doctor that's a chiropractor?

A. Yeah, and I owe him a big doctor bill and I quit going on acount of I couldn't afford to pay it. (Vol. II, t.p. 44)

Q. Allright, now, when you go home, I want you to try to remember, if you can, the name of the chiropractor that treated you. I want to get as much evidence as I can about your physical condition as it was before June 30, 1962. And in particular what your condition was when you had to retire or quit work

at the Guide Lamp Division. The record that we have now is not very complete, but it's the best that we can get.

A. Well, I don't see how come he sent one in there, 'cause it's his fault that I went out of the factory. I tried to work and I was sick and he got aggravated at me, 'cause I was sick and throwed me out. (Vol. II, t.p. 48)

Q. What doctor examined you for the insurance company so that you could get your sick benefits, do you remember? Was it the company doctor?

A. Yeah.

Q. Do you remember his name?

A. No. (Vol. II, t.p. 49)

Q. Well it's not necessary that you be examined but it may be possible if the record so indicates. As it is now, there is very little evidence in the record to show exactly what you had before June 30, 1962, and practically nothing to show why you quit work in 1956. (Vol. II, t.p. 49)

Q. Let the record show that the claimant waives the right to see the report of examination. Do you do any reading around the house, any magazines?

A. I can't read, I'll plain out with you, I won't lie to you anything you ask me I won't lie.

Q. You can't read?

A. No.

Q. I don't want you to lie, can you read?

A. I know how to write my name and I know how to count and some of my ABC's, so I won't lie to you.

Q. Can you get a-hold of a newspaper and read the newspaper?

A. No. I went to school and my teacher passed me 'cause I never had my books, they wouldn't help me with my books. They just passed me on 'cause I didn't have books. Never learned how to read.

Q. In other words, you cannot read?

A. Yes you're right. I won't lie to you. Won't lie to anything 'cause I belong to the church. (Vol. II, t.p. 50)"

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 260

MARY GRANGER, PETITIONER

v.

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

This action was instituted in the district court by petitioner to obtain review, pursuant to Section 205(g) of the Social Security Act (42 U.S.C. 405(g)), of the final decision of the Secretary of Health, Education and Welfare denying her a period of disability and disability insurance benefits. The district court granted the Secretary's motion for summary judgment on the ground that the administrative decision was supported by substantial evidence (Pet. App. A1–A13). In the course of its opinion, the court stated that "it would be sheer, unfounded speculation to insist that legal representation was necessary to insure that

plaintiff obtain a fair and impartial hearing" (Pet. App. A3).

On appeal, petitioner's sole contentions were that the administrative hearing was unfair because she had no counsel, and that she was misinformed by the hearing examiner as to her right to counsel (Pet. App. A14–A15). The court of appeals affirmed the district court's decision in an opinion concluding that petitioner was not prejudiced by the absence of counsel at the administrative hearing (Pet. App. A16–A17).

Although petitioner's attorneys have labeled their client an "illiterate moron" who is incapable of even the most elementary of human responses, the record clearly shows the contrary. Petitioner not only adequately described her physical and mental condition and vocational and educational background at the hearing, but quite persuasively argued that she was entitled to disability benefits under the Social Security Act (*e.g.*, Tr. 36, 37, 39, 40, 41, 42, 43, 45, 46, 47, 48, 49). Moreover, the court of appeals found that the hearing examiner exercised special care to ensure that all of the evidence favorable to petitioner's contentions was adequately presented at the hearing and included in the record (Pet. App. A16). Indeed, subsequent to the hearing, the record was reopened to include the medical report of Dr. Robert A. Rauh, a specialist in internal medicine, and the psychometric and psychological evaluation of Dr. M. C. Beyerl, a psychologist. It was only after considering the medical reports of three doctors and the

psychological evaluation of Dr. Beyerl, along with the vocational evidence and claimant's own testimony, that the hearing examiner made his decision.

The court below held that the Social Security Act does not require, as petitioner urges (Pet. 9), that the Secretary must advise claimants of a right to employ attorneys on a contingent fee basis at hearings before the Social Security Administration (Pet. App. A17; 42 U.S.C. (Supp. V) 406(a)). On the contrary, a contingent fee might be administratively disapproved (see 20 C.F.R. 404.976(b)) or the case might be such that an attorney would not take it on a contingent basis. Thus, advice that petitioner could get representation on a contingent fee basis might be misleading. In short, petitioner received the hearing she was entitled to as a matter of due process, and denial of the disability benefits she sought was grounded on substantial evidence.

Accordingly, for the reasons summarized herein and more fully elaborated in the opinions of the courts below, on which we rely, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1970.

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